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No. 07-623

FILED
JAN 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,
v.
THE CITY OF SEATTLE,
Respondent.

FORD MOTOR COMPANY,
Petitioner,
v.
THE CITY OF TACOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION

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January 2008

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case concerns taxation of a business engaged in wholesale sales of vehicles and parts delivered to the Cities of Seattle and Tacoma ("Cities"). The Washington Supreme Court's decision upholding the taxes at issue is correct and consistent with federal and state precedent, including this Court's decision in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). No further review is warranted.

1. The Cities' Tax Systems. The Cities impose a business and occupation ("B&O") tax on all persons engaging in business activity within the City. Seattle Mun. Code ("SMC") 5.44.400; SMC 5.45.050; Tacoma Mun. Code ("TMC") 6.68.220(B).[1] The taxes are not imposed on income (an "income tax") or on retail sales (a "sales tax"). Instead, the taxes are B&O taxes, a form of gross receipts taxes, imposed "for 'the privilege of doing business' in a particular jurisdiction." Pet. App. 5a-6a; *see* Wash. Rev. Code §35.102.030(3); Paul J. Hartman, *Federal Limitations on State & Local Taxation*, § 9:1, p. 211 (2d ed. 2003).

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[1] During the audit period, Seattle reorganized and amended its tax code, although the effect of the relevant provisions did not change. For the portion of the audit period through December 31, 2001, SMC ch. 5.44 governs. In addition, all references to the Tacoma ordinances are to those in effect during the audit period.

The Cities define "engaging in business" broadly to include any business activity which is carried on within the City. SMC 5.44.022(8); SMC 5.30.030(B); TMC 6.68.130. When a seller has a sufficient nexus with the Cities, and delivery to the purchaser occurs in the Cities, the Cities measure the tax by 100 percent of the gross proceeds from the wholesale sale of those goods within the Cities. Pet. App. 13a; SMC 5.44.422(A), 5.45.050(C), 5.45.080(B); Seattle Bus. Tax R. 5-44-193A(3); SMC § 5.44.400(C); TMC 6.68.220(B), Tacoma Tax R. 103, 193-B.

The State of Washington taxes interstate sales of goods in exactly the same way: delivery and receipt of the goods by the purchaser must occur in Washington. Wash. Admin. Code § 458-20-193(7). When these events occur in Washington, the state measures the tax by 100 percent of the gross proceeds of the sale. Wash. Rev. Code § 82.04.270. As with the Cities, the State of Washington does not tax the wholesale sale of goods that are delivered and accepted outside Washington. Wash. Admin. Code § 458-20-193.

2. Ford's Activities. Ford sells new vehicles to a network of independently-owned dealers throughout the United States, including dealers in the Cities. Ford conducts extensive activities in Seattle and Tacoma related to the wholesale sale of vehicles to its dealers. These activities include advertising, meeting with dealers, imparting information about new products, discussing problems and customer satisfaction concerns, and marketing and selling warranties on its automobiles. Pet. App. 2a. All of these activities are for the purpose of selling Ford products to dealers located in the Cities

and helping those dealers sell Ford products to retail customers. *Id.*

Once the vehicles are manufactured, Ford or its representative arranges for the vehicles to be delivered to the dealer's facilities in Tacoma and Seattle. The dealer receives and accepts the vehicles at the dealer's lot.

Ford concedes that it engages in wholesaling activities in the Cities, and that these activities are sufficient to establish a taxable presence that allows the City to impose a wholesaling B&O tax. Pet. 5, n.4. In addition, it is undisputed that the Cities do not include all of Ford's sales in the measure of the tax. Ford is a large corporation with sales to dealers in many states and other countries. The Cities tax only the gross receipts from sales of goods delivered to dealers located in the Cities. Pet. App. 13a; SMC 5.44.400(C), 5.44.422A, 5.45.080A; TMC 6.68.220(B); Tacoma Tax R. 103, 193-B.

REASONS FOR DENYING THE PETITION

I. The Washington Court's Decision Does Not Conflict With Decisions From Other States.

Contrary to Ford's assertions, the Washington Supreme Court's decision does not conflict with decisions of other state courts of last resort. Ford has not cited any case (and the Cities are aware of none) in which a federal court of appeals or a state supreme court has interpreted the Commerce Clause to prohibit a city or state from imposing a B&O tax measured by 100 percent of gross receipts from

interstate sales of goods delivered to and accepted in the taxing jurisdiction.

There is no conflict between the decision in this case and *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996). In arguing to the contrary, Ford overlooks a critical factual distinction between the two cases. In *Winchester,* the city sought to tax the entire gross revenue of a company that operated 24 facilities in 13 states, merely because the company's headquarters was located in Winchester. Unlike Winchester, the Cities limit the measure of their B&O taxes to goods delivered and accepted in the Cities. Similarly, in *M & Associates, Inc. v. City of Irondale,* 725 So.2d 592 (Ala. 1998), the City of Irondale sought to tax gross receipts from all of the taxpayer's sales, including interstate sales of goods delivered outside the city. Here, in contrast, the Cities' taxes are limited to interstate sales of goods delivered in the Cities.

Ford also cites two decisions of the Pennsylvania Supreme Court that do not conflict (let alone "squarely" conflict, *see* Pet. 11) with the decision in this case. In *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), only three of the seven justices joined the portion of the Court's opinion holding that the Commerce Clause required apportionment of the tax at issue. *Id.* at 113. Moreover, *Philadelphia Eagles* concerned a tax on royalties earned from media contracts, not a tax on the sale of goods. The City of Philadelphia tax code distinguishes between a tax on royalties and a tax on making wholesale sales of goods. *See* Philadelphia Bus. Privilege Tax

Regulations §§ 304, 310, 222. In *Philadelphia Eagles*, the court addressed only the portion of the city tax code dealing with royalty income, and did not address the city's tax on selling tangible personal property. Indeed, the court recognized the longstanding precedent that further apportionment of gross proceeds from interstate sales of goods is not required because only the destination state taxes the selling activities. *Philadelphia Eagles*, 823 A.2d at 129. The Pennsylvania court commented that in imposing a wholesaling B&O tax on the sale of goods, "the state of destination can tax that selling activity, without the risk of multiple taxation for the same activity."[2] *Id.*

In fact, the City of Philadelphia taxes companies selling goods delivered to Philadelphia in the same way that the Cities taxed Ford. The City of Philadelphia imposes its business privilege tax upon the gross receipts of "every person engaging in any business in the City of Philadelphia." *Philadelphia Eagles*, 823 A.2d at 113; Philadelphia Code

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[2] Some courts have held that a wholesaling B&O tax on 100 percent of the gross proceeds from the sales of goods is inherently apportioned by virtue of permitting only the destination jurisdiction to impose such a tax. *See Standard Press Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 564 (1975). Other courts characterize a tax imposed on 100 percent of the gross proceeds from the sales of goods as appropriate but "unapportioned." *See General Motors Corp. v. Washington*, 377 U.S. 436, 448 (1964). Both characterizations lead to the same result; a destination city can impose a wholesaling B&O tax on 100 percent of the gross proceeds from the sales of goods delivered and accepted in that jurisdiction. *See* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance & Procedure*, § 13.6 at 525 (4th ed. 2007).

§ 19-2603(1). All receipts from the sale of goods delivered into the City of Philadelphia are included in taxable receipts. Philadelphia Bus. Privilege Tax Reg. § 304(1). As in the Cities here, receipts from sales of goods delivered outside Philadelphia are excluded from taxable receipts. *Id.* Thus, contrary to Ford's contention, the *Philadelphia Eagles* decision is consistent with the Washington Supreme Court's decision in *Ford*.

The Pennsylvania court's decision in *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004), is distinguishable on the same grounds. Upper Moreland Township sought to tax receipts for construction services, including services provided outside the Township (and outside the state of Pennsylvania). The Pennsylvania court rejected the argument that the Northwood Construction Company's "maintenance of its primary business office in the Township permits the Township to tax 100% of Northwood's receipts generated in connection with interstate activity." *Id.* at 804. Thus, the Pennsylvania court did not hold that a B&O tax on sales of goods delivered to purchasers in the Township must be apportioned beyond where the goods are delivered.

Ford also cites *Southern Pacific Transportation Co. v. Arizona*, 44 P.3d 1006 (Ariz. App. 2002), a decision of Arizona's intermediate court of appeals. The tax at issue in *Southern Pacific*, like the tax in *Philadelphia Eagles*, was a tax on the sale of services rather than goods. If the taxpayer in *Southern Pacific* had made retail sales of tangible personal property delivered to the state, those sales

would have been subject to Arizona's transaction tax and measured by 100 percent of the gross receipts. Ariz. Rev. Stat. §§ 42-5008 42-5061(A). Furthermore, the court's discussion of the Commerce Clause was unnecessary to its decision, because it ultimately held that the legislature did not intend to tax transportation services performed over interstate routes. *Southern Pacific*, 44 P.3d at 1017. Thus, the decision in *Southern Pacific*, like the other decisions cited by Ford, does not conflict with the Washington Supreme Court's decision below.

Finally, Ford's reliance on *General Motors Corp. v. City & County of Denver*, 990 P.2d 59 (Colo. 1999), also is misplaced. The tax at issue in that case was a use tax, not a B&O tax. *Id.* at 65.

In sum, Ford cites no case in which the highest court of a state has held that the Commerce Clause prohibits a city from imposing a wholesaling B&O tax on 100 percent of the gross receipts from interstate sales of goods by a company that has a taxable nexus with the city, and where the goods are delivered to the city. Consequently, there is no conflict that warrants review by this Court.[3]

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[3] As noted above, Ford concedes that it has a taxable presence in the Cities, and that it is subject to the Cities' B&O tax. Pet. 5 n.4. Although Ford notes that it entered into contracts with its dealers providing that title to the vehicles passes at the vehicle assembly plant, it is undisputed that the vehicles are physically delivered to and accepted at the dealers' facilities in the Cities. Pet. 6; Brief of Respondent City of Seattle to Wash. State Supreme Court pp. 6-7; Brief of Respondent City of Tacoma to Wash. Supreme Court p. 6. *See General Motors Corp. v. Washington*, 376 P.2d 843 (Wash. 1962), *aff'd*, 377 U.S. (...continued)

II. The Washington Supreme Court Decision Is Consistent With This Court's Decisions On Apportionment Of Gross Receipts Taxes On Sales Of Goods.

For over a century, this Court has upheld the nondiscriminatory gross receipts taxes on interstate sales of goods imposed by the state of destination. *See Tyler Pipe Indus., Inc. v. Washington Department of Rev.*, 483 U.S. 232 (1987); *Standard Pressed Steel Co. v. Dept. of Revenue*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Field Enters., Inc. v. Washington*, 352 U.S. 806 (1956), *aff'd per curiam* 289 P.2d 1010 (Wash. 1955); *Norton Co. v. Dep't of Rev.*, 340 U.S. 534 (1951); *Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340 (1944); *Allied Mills, Inc. v. Dep't of Treasury*, 318 U.S. 740 (1943), *aff'g per curiam* 42 N.E.2d 34 (Ind. 1942); *Dep't of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941); *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1886). This issue is well-settled.

Two decades ago, Ford made the same argument it is making here, and this Court rejected it. *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987).[4] Like the Cities, the

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436 (1964) (taxpayer cannot control the location of sales of its vehicles, and avoid state and local taxation, by contract).

[4] Ford was one of more than 50 plaintiffs whose cases were consolidated in the state court actions that resulted in this Court's *Tyler Pipe* decision. *See National Can Corp. v. Washington State Dep't of Revenue*, No. 85-2006, Joint Statement, App. F.

State of Washington imposes a wholesaling B&O tax on persons making wholesale sales within the state. Washington measures this tax based upon 100 percent of the gross receipts on all wholesale sales of goods delivered in the state. Wash. Rev. Code § 82.04.270; Wash. Admin. Code § 458-20-103. In *Tyler Pipe*, this Court considered the argument of Ford and the other taxpayers that Washington inappropriately imposed a wholesaling B&O tax on 100 percent of gross receipts of products delivered in Washington even where some sales activity occurred in other states. *See* No. 85-2006, *Nat'l Can Corp v. Washington State Dep't of Revenue*, Br. of Appellant 13; No. 85-1963, *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, Reply Br. of Appellant 7.

This Court unanimously rejected Ford's argument and held that Washington's wholesaling B&O taxes are fairly apportioned:

> [T]he activity of wholesaling-whether by an in-state or an out-of-state manufacturer must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. *See Moorman Mfg. Co. v. Bair*, 437 U.S., at 280-281, 98 S.Ct., at 2348-2349 (gross receipts tax on sales to customers within State would be "plainly valid"); *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S., at 564 (selling tax measured by gross proceeds of sales is "apportioned exactly to the activities taxed").

Tyler Pipe, 438 U.S. at 251; *see also* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance & Procedure*, § 13.6 at 525 (4th ed. 2007). The tax was inherently apportioned because it applied only to sales of goods delivered to customers in the state.

The Cities' wholesaling taxes are identical in all relevant respects to the state of Washington's wholesaling tax at issue in *Tyler Pipe*. The Cities' taxes are measured by 100 percent of gross proceeds of sales if a taxpayer has a taxable nexus with the state and the goods are received by the buyer in Washington. Therefore, the Washington State Supreme Court's decision in this case is in accord with this Court's precedents that a tax on interstate sales measured by 100 percent of gross proceeds of sales is "apportioned exactly to the activities taxed." *Tyler Pipe*, 483 U.S. at 251, *quoting Standard Pressed Steel*, 419 U.S. at 564.

Tyler Pipe considered both manufacturing and wholesaling activities, but its central holding is that Washington State's wholesaling B&O tax based on 100 percent of the gross receipts of sales in Washington is valid even though some of the activities related to the sales took place in other states. Ford attempts to distinguish *Tyler Pipe* from this case on the ground that "substantially all of the taxpayer's wholesaling activities took place within the State." Pet. 21. But as this Court noted, "Tyler maintains no office, owns no property, and has no employees residing in the State of Washington. Its solicitation of business in Washington is directed by executives who maintain their offices out-of-state and by an independent contractor located in Seattle."

Tyler Pipe, 483 U.S. at 249. In this case, moreover, it is undisputed that Ford engaged in substantial wholesaling activities in the Cities, including advertising, sending representatives to meet with dealers and managers, imparting information about new products, discussing problems and customer satisfaction concerns, and marketing and selling warranties. Pet. App. 2a. Ford's attempt to distinguish this case from *Tyler Pipe* is therefore unpersuasive.

The decision below is also consistent with this Court's decisions in *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175 (1995) and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). In *Jefferson Lines*, a case upon which Ford relies, the Court upheld Oklahoma's *retail sales* tax on the full price of a ticket for interstate transportation services. 514 U.S. at 200. In so holding, the Court did not overrule or question *Tyler Pipe*, or the Court's other decisions concerning B&O taxes imposed on sales of goods. Indeed, the Court cited *Tyler Pipe* and *International Harvester* without questioning either their holdings or their reasoning. *See id.* at 189, 192 n.6.[5]

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[5] In *Central Greyhound*, decided prior to *Tyler Pipe*, the Court held that a gross receipts tax on bus transportation services—not a wholesale sale of goods—must be apportioned. Because *Central Greyhound* dealt with a gross receipts tax and not a sales tax, this Court in *Jefferson Lines* stated that "*Central Greyhound* provides the wrong analogy for answering the sales tax apportionment question. . . ." *Jefferson Lines*, 514 U.S. at 190. Thus, neither *Central Greyhound* nor *Jefferson Lines* requires the Court to reconsider its decision in *Tyler Pipe*.

Since Ford's argument was rejected in *Tyler Pipe*, Ford has continued to urge this Court to reconsider the apportionment issue and overrule *Tyler Pipe*. In two companion cases, Ford and other taxpayers petitioned this Court for a writ of certiorari, in part, on the issue of whether Washington State's wholesaling B&O tax was properly apportioned. The Court denied their petitions. *See W. R. Grace & Co.-Connecticut v. Washington Dep't of Revenue*, 528 U.S. 950 (1999); No. 99-38, *Buffelen Woodworking Co. v. Dep't of Revenue*, Pet. ii. In *W.R. Grace*, the Washington Supreme Court rejected as "meritless" the taxpayers' argument that this Court's decision in *Jefferson Lines* signaled a change in the law concerning apportionment of gross receipts taxes on sales of goods. *W.R. Grace & Co. v. Dep't of Revenue*, 973 P.2d 1011, 1018 (Wash. 1999). Ford is making the same argument in this case.

More recently, this Court denied a petition for writ of certiorari in a substantially similar case against Seattle. General Motors Corporation challenged Seattle's wholesaling B&O tax claiming that, under *Jefferson Lines*, Seattle should apportion General Motors' income based on sales activity occurring outside the state. *General Motors Corp. v. City of Seattle*, 25 P.3d 1022, 1030-1032 (Wash. App. 2001), *cert. denied*, 535 U.S. 1056 (2002). The Court should deny the petition in this case, just as it denied the petitions in *General Motors* and *W.R. Grace*.

III. Courts And Legislatures Have Long Recognized The Right Of The Destination Jurisdiction To Impose A Gross Receipts Tax On Interstate Sales Of Goods.

There are several additional reasons for the Court to deny the petition in this case. *First*, Ford has not shown that it is subject to multiple taxation. Because tangible personal property is delivered in only one location, Ford does not pay a wholesaling B&O tax to any jurisdiction other than the Cities.[6]

Second, effective January 1, 2008, Washington State law requires cities that impose wholesaling B&O taxes to apportion gross income based on where the goods are delivered. Wash. Rev. Code § 35.102.130 ("Gross income derived from all activities other than those taxed as service or royalties shall be allocated to the location where the activity takes place. . . . In the case of sales of tangible personal property, the activity takes place where delivery to the buyer occurs.") Thus, the Cities are now *required* by a state law – which is not at issue in this case – to impose their wholesaling

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[6] Moreover, both Seattle and Tacoma offer a deduction in certain circumstances against the wholesaling B&O taxes paid to the Cities. The deduction provides: "A taxpayer that has paid an eligible gross receipts tax with respect to a sale of goods or services, to a jurisdiction in which the goods are delivered or the services are provided, may deduct an amount equal to the gross receipts used to measure the tax from the measure of the tax owed to the City." *See* SMC 5.45.075; TMC 6.68.075. Ford has not sought to claim the deduction in this case, presumably because it is only paying wholesaling B&O taxes where the vehicles and parts are delivered. Nevertheless, the deductions provide further protection from double taxation.

B&O tax on Ford based on where the goods are delivered to the buyer.

Third, and more generally, Ford is asking this Court to alter the way in which states and cities have imposed wholesaling B&O taxes for more than a century. The concern for maintaining the stability of the law "counsels adherence to settled precedent." *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992). Moreover, "[t]he Constitution gives that branch of government [Congress] the power to regulate commerce among the states, and until it acts . . . we should enter the field with extreme caution." *General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) (*quoting Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) (Black, J., concurring)); *see also Quill Corp.*, 504 U.S. at 318 (concluding that burden on interstate commerce is "not only [a determination] that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve").

Ford objects to the existing system that permits the destination jurisdiction to tax interstate wholesale sales and seeks to replace it with an apportionment system involving the originating location, the delivery location, and any other location where any activity related to the sale occurs. The apportionment system sought by Ford would introduce new complexities for taxpayers and taxing authorities. Moreover, Ford's proposal would upset the present system by requiring wholesale sellers to pay wholesaling B&O tax to the state or city of origin.

Requiring cities and states to apportion sales of goods would not prevent double taxation unless

the Court imposed the same apportionment system on all taxing authorities. In fact, in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), this Court upheld an apportionment method that assigned the sales to only the state of destination and recognized that a taxpayer's request to mandate apportionment to prevent double taxation would "require extensive judicial lawmaking." *Id.* at 278-79. This Court declined to do so and stated "It is to [Congress], and not this Court, that the Constitution has committed such policy decisions." *Id.; see* Hartman, *Federal Limitations on State & Local Taxation*, § 9:4, p. 235.

The arguments for adhering to existing precedent are especially strong where Congress has long been aware of a common taxing practice and has taken no action to forbid it. As this Court observed more than 125 years ago, "[t]he long continued silence of Congress, with its plenary power, in the presence of [legislation] . . . is itself an implied ratification and adoption, and is equivalent in its consequences to an express declaration to that effect." *Wilson v. McNamee*, 102 U.S. 572, 575 (1881); *see also General Motors Corp.*, 519 U.S. at 305 (concluding that Congress' failure to alter a longstanding state practice indicates that Congress believes the practice to be "within the realm of what the States may reasonably promote and preserve").

That is exactly the situation here. More than 40 years ago, Congress recognized that courts were permitting interstate sales to be taxed by the state or city of destination. In 1959, Congress directed both the Committee on the Judiciary of the House of Representatives and the Committee on Finance of the Senate to make a full and complete study of "all

matters pertaining to the taxation by the States of income . . . from the conduct of business activities which are . . . a part of interstate commerce." Pub. L. 86-272, § 201, 73 Stat. 555, 556 (1959). The resulting reports of the Special Subcommittee on State Taxation of Interstate Commerce were presented to Congress in 1964 and 1965. The committee confirmed that courts permitted the states of destination to tax interstate sales. Special Subcommittee on State Taxation of Interstate Commerce, Committee on the Judiciary, House of Representatives, State Taxation of Interstate Commerce, H.R. Rep. No. 88-1480, pt. 3, at 681-82, 1042-46, 1060, 1081 (1964). Despite this recognition, Congress has done nothing to change the law. *See* Hartman, *Federal Limitations on State & Local Taxation*, § 9:4, p. 231, n.25. In its report, Congress found that the application of an apportionment formula to gross receipts taxation would "constitute a departure from the present practice" and "would seriously conflict with the structure of gross receipts taxation." H.R. Rep. No. 88-1480, pt. 3, at 1113 (1964).[7]

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[7] Ford asserts that the question it presents is "of great and growing national importance" because "nearly 1,200 counties, cities, towns, and other state political subdivisions impose business activities taxes on gross receipts derived from operations carried on within their localities." Pet. 18. But in 1964, Congress noted that at least 1,000 local jurisdictions imposed a gross receipts tax. H.R. Rep. No. 88-1480, pt. 3, at 1067, 1091. Rather than asking the Court to review a new phenomenon, Ford is seeking to overturn long-established practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

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January 2008

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